Mohd Salleh bin Sheikh Ahmad v Yewpam Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–02–918 OF 2001

GOPAL SRI RAM, ABDUL AZIZ MOHAMAD and MOHD GHAZALI JJCA
27 OCTOBER 2005

Civil Procedure — Counterclaim — Defence to counterclaim — Without merit — Dismissal of counterclaim — Whether plaintiff entitled to rely on the prayer of defendant's counterclaim

Equity — Equitable remedies and reliefs — Specific performance — Whether upon award of damages in lieu of specific performance, other consequential order can be made

The parties in this case sued for specific performance of a first agreement and in the alternative claimed liquidated damages of RM2,610,000. It also claimed interest on its claim for liquidated damages. There was no other form of relief was claimed by the plaintiff. The defendant pleaded several defences. He also raised a counterclaim in which he claimed several forms of relief. All defences failed as did the case pleaded in the counterclaim. Despite this, the trial judge proceeded to make several orders on the claim and the counterclaim.

Held, varying the orders:

(1) (per **Gopal Sri Ram JCA**) It is trite that once a counterclaim is found to be without merit, the only path open to a court is to dismiss it. A court is not entitled to resurrect a dead counterclaim to found a basis for granting relief which the court considers should be granted on the facts. If that is done, there is a serious risk of it being taken as an attempt at palm tree justice. Further, a prayer for relief in a counterclaim cannot be used against the defendant himself (see para 4).

(2) (per **Gopal Sri Ram JCA**) If the plaintiff wanted the kind of orders the judge made, it should have amended its statement of claim to include them. It could not rely on the defendant's counterclaim to obtain relief against the defendant himself. Also, the plaintiff could not, when delivering its reply and defence to counterclaim, have added a counterclaim to the defendant's counterclaim since it was already a party to the action. That avenue was open only to a defendant to the counterclaim who was not already a party in the main action (see para 5).

(3) (per **Gopal Sri Ram JCA**) The second order, though not claimed by the plaintiff was a necessary adjunct and hence a consequential order. No complaint could be made about it. In fact there was no complaint about it. That was hardly surprising. After all, the High Court here was being moved for equitable relief in the form of specific enforcement. When considering the grant of specific relief the High Court, as a Court of Equity, was entitled to

grant alternative relief or to impose conditions (as was done in *Solle v Butcher* [1949] 2 All ER 1107) or to require an equitable adjustment to be made between the parties (see para 6).

(4) (per **Abdul Aziz bin Mohamad JCA**) Since the second order had been sought by the appellant himself, naturally it was not included in his notice of appeal as a decision appealed against. As, however, the appellant did not appeal against the second order, and as moreover it was an order that the appellant himself sought in his counterclaim, the question of justifying or finding support for the second order did not arise and could not have arisen in the appeal (see para 9).

[Bahasa Malaysia summary

Pihak-pihak dalam kes ini telah menyaman untuk perlaksanaan spesifik terhadap perjanjian pertama dan secara alternatif menuntut ganti rugi boleh dikira sejumlah RM2,610,000. Ia juga menuntut faedah atas tuntutannya untuk ganti rugi boleh dikira. Plaintif tidak menuntut sebarang bentuk relief lain. Defendan telah memplidkan beberapa pembelaan. Beliau juga telah menimbulkan satu tuntuan balas di mana beliau menuntut beberapa bentuk relief. Kesemua pembelaan telah gagal begitu juga dengan kes yang yang diplidkan dalam tuntutan balas. Meskipun begitu, hakim perbicaraan telah meneruskan untuk membuat beberapa perintah berhubung tuntutan dan tuntutan balas tersebut.

Diputuskan, mengubah perintah-perintah tersebut:

(1) (oleh **Gopal Sri Ram HMR**) Adalah mantap bahawa apabila tuntutan balas didapati tanpa merit, satu-satunya jalan terbuka kepada mahkamah adalah untuk menolaknya. Mahkamah tidak berhak menghidupkan semula tuntutan balas yang ditolak untuk menemui satu asas bagi memberikan relief yang mahkamah anggap patut diberikan berdasarkan fakta. Jika itu berlaku, terdapat risiko serius ia dianggap sebagai satu percubaan untuk 'palm tree justice'. Bahkan, apa-apa permohonan dalam satu tuntutan balas tidak boleh digunakan terhadap defendan (lihat perenggan 4).

(2) (oleh **Gopal Sri Ram HMR**) Jika plaintif inginkan perintah sedemikian yang hakim putuskan, ia sepatutnya meminda pernyataan tuntutannya untuk memasukkannya. Ia tidak boleh bergantung pada tuntutan balas defendan untuk memperoleh relief terhadap defendan sendiri. Juga, plaintif tidak boleh, apabila menyampaikan jawapan dan tuntutan balasnya, menambah satu tuntutan balas kepada tuntutan balas defendan memandangkan ia telah pun menjadi satu pihak kepada tindakan itu. Ruang itu hanya terbuka kepada defendan yang mana dalam tuntutan balas bukan merupakan pihak dalam tindakan utama (lihat perenggan 5).

(3) (oleh **Gopal Sri Ram HMR**) Perintah kedua, meskipun tidak dituntut oleh plaintif adalah tambahan yang perlu dan oleh itu satu perintah tambahan. Tiada aduan boleh dibuat tentangnya. Bahkan tidak dapat sebarang aduan tentangnya. Ini tidak memeranjatkan. Lagipun, Mahkamah Tinggi telah diminta untuk memutuskan untuk relief ekuiti dalam bentuk penguatkuasaan spesifik. Apabila membuat pertimbangan untuk memberi relief spesifik

Mahkamah Tinggi, sebagai Mahkamah Ekuiti, berhak memberikan relief alternatif atau mengenakan syarat (sepertimana dilakukan dalam *Solle v Butcher* [1949] 2 All ER 1107) atau memerlukan satu penyelarasan ekuiti yang dibuat antara pihak-pihak berikut (lihat perenggan 6).

(4) (oleh **Abdul Aziz Mohamad HMR**) Memandangkan perintah kedua telah dipohon oleh perayu sendiri, sememangnya ia tidak dimasukkan dalam notis rayuan beliau sebagai satu keputusan yang dirayu. Memandangkan perayu tidak merayu terhadap perintah kedua, dan oleh sebab ia satu perintah yang perayu sendiri pohon dalam tuntutan balasnya, persoalan menjustifikasikan atau mendapatkan sokongan untuk perintah kedua tidak timbul dalam rayuan (lihat perenggan 9).]

Notes

For a case on defence to counterclaim, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2002.

For cases on specific perfoemance, equitable remedies and reliefs, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) parsa2519–2553.

Cases referred to

Diisik v Newton (1985) 62 BCLR 1 (refd)

Pettkus v Becker (1980) 117 DLR (3d) 257 (refd)

Solle v Butcher [1949] 2 All ER 1107 (refd)

Appeal from: Civil Suit No 22–13 of 2000-I (High Court, Kuching)

Wong Chong Wah (Shankar P, Asnani and Elanie Ho with him) (Shankar Ram & Co) for the plaintiff.

James Lo Kuin Chuan (George Lo & Partners) for the defendant.

Gopal Sri Ram JCA:

[1] The parties in this case entered into two separate agreements. The first agreement is dated 14 November 1996. The second is dated 19 October 1998. The plaintiffs sued for specific performance of the first agreement and in the alternative claimed liquidated damages of RM2,610,000. It also claimed interest on its claim for liquidated damages. It is important to stress here that no other form of relief was claimed by the plaintiff.

[2] The defendant pleaded several defences. He also raised a counterclaim in which he claimed several forms of relief. All defences failed as did the case pleaded in the counterclaim. Despite this, the trial judge proceeded to make several orders on the claim and the counterclaim. We quote them from his judgment:

> In the premises:
>
> 1 Judgment is entered for the plaintiff against the defendant for the sum of RM870,000 together with statutory interest and costs;
>
> 2 The plaintiff shall cause to be re-transferred to the defendant the 30% share in the firm of Syarikat State Motor;

3 An account shall be taken of the rentals of the shops and the house which the plaintiff or Ho Kok Thin or their nominee had received or the relevant market value of the rent receivable at the relevant time for these properties where the properties had been used by the plaintiff or Ho Kok Thin or their nominee;

4 These sums when found shall be regarded as an amount due from the plaintiff to the defendant and the defendant shall be given credit and the balance of RM2,339,961.42 owing by the defendant to the plaintiff shall be reduced accordingly and the reduced sum so found shall be regarded as a debt due from the defendant to the plaintiff;

5 The shops shall be sold by public auction within 90 days hereof at the reserved price of RM1,025,800 and it is to be free from encumbrances.

6 The house shall be sold by public auction within 90 days hereof at the reserved price of RM254,800.

7 The plaintiff shall cause the auctions to be conducted by a court bailiff by taking out a summons for directions for that purpose and the plaintiff shall bear the initial costs of the auctions.

8 The plaintiff or Ho Kok Thin or their nominee shall be liable to discharge all the charges created against the properties to enable a transfer of the properties free from encumbrances in the event that a party other than the plaintiff or Ho Kok Thin or their nominee successfully bided for the properties or any of them provided that the proceeds of the sale shall first go towards satisfying the charge or charges with the plaintiff or Ho Kok Thin or their nominee making up the deficient amount, if any.

9 The plaintiff or Ho Kok Thin or their nominee shall be entitled to bid for the properties and they shall be entitled, in the event that they are successful, to off-set the amount owing by the defendant to the plaintiff aforesaid as payment of the bid price.

10 In the event of the plaintiff or Ho Kok Tin or their nominee successfully bidding for the property, the bailiffs fee shall be paid by the plaintiff on behalf of the defendant and such fee shall become a debt due from the defendant to the plaintiff in the account to be taken.

11 In the event of a successful bid by someone else, the proceeds of the sale shall be deposited with the court to be dealt with as aforesaid and the balance, if any, shall await an order of the court.

12 The parties are at liberty to agree on the sale of the properties by private treaty at such sums and on such conditions as they may agree notwithstanding the orders I have just made.

There will be no order as to costs for the counterclaim as on the whole the defendant can be said to have failed though an account has been ordered to be taken but this is miniscule compared to the other counterclaims which had failed.

[3] Several issues were raised before us. Because of the approach we took in this appeal at the close of arguments, I find it unnecessary to deal with any of them save one. And that has to do with whether the judge was correct in making orders (3) through (12) quoted above. A careful reading of his judgment leaves no doubt that he was completely dissatisfied with the defendant's evidence. He was entirely justified in that. Even basing myself on the printed notes of evidence, I find myself entirely in agreement with the judge that the defendant wholly lacked credibility. That is why the judge found the defences to be hollow and the counterclaim to lack any evidential foundation.The difficulty in this case is that having decided against the defendant on the counterclaim, he proceeded to make orders on it.

[4] It is trite that once a counterclaim is found to be without merit the only path open to a court is to dismiss it. A court is not entitled to resurrect a dead counterclaim to found a basis for granting relief which the court considers should be granted on the facts. If that is done there is a serious risk of it being taken as an attempt at palm tree justice. Further, a prayer for relief in a counterclaim cannot be used against the defendant himself. These are indeed the complaints of Mr Wong Chong Wah of counsel for the defendant (the appellant before us). I find these complaints justified.

[5] Learned counsel for the plaintiff (respondent before us) made a feeble attempt at justifying the orders that are the subject matter of complaint in this appeal. He said that he was entitled to rely on the defendant's counterclaim to support these orders. I have already demonstrated the futility of this argument.If the plaintiff wanted the kind of orders the judge made, it should have amended its statement of claim to include them. It could not rely on the defendant's counterclaim to obtain relief against the defendant himself. Also, the plaintiff could not, when delivering its reply and defence to counterclaim, have added a counterclaim to the defendant's counterclaim since it was already a party to the action. That avenue is open only to a defendant to the counterclaim who is not already a party in the main action.

[6] So far as the first order is concerned, the judge was amply justified in making the award of damages in lieu of specific performance having satisfied himself that the claim had been made out on the evidence. Next, the second order, though not claimed by the plaintiff is a necessary adjunct and hence a consequential order. No complaint may be made about it. In fact there is no complaint about it. That is hardly surprising. After all, the High Court here was being moved for equitable relief in the form of specific enforcement. When considering the grant of specific relief the High Court, as a Court of Equity, is entitled to grant alternative relief or to impose conditions (as was done in *Solle v Butcher* [1949] 2 All ER 1107) or to require an equitable adjustment to be made between the parties

[7] *Diisik v Newton* (1985) 62 BCLR 1, a decision of the Court of Appeal of British Columbia is an instructive case on the flexibility of equitable remedies. That case is authority for the proposition that where rescission is impossible or inappropriate, and it would be inequitable for a defendant to retain the benefits of an unconscionable bargain, a Court of Equity could mould a remedy, such as equitable adjustment, to achieve justice. The court in that case relied on the following passage in the judgment of Dickson J (as he then was) in *Pettkus v Becker* (1980) 117 DLR (3d) 257 where he said (at p 273):

> The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.

The second order made by the learned judge is plainly supportable on this basis.

[8] For the reasons already given, the appeal was allowed in part. Orders (1) and (2) were affirmed. The orders (3) through (12) were set aside. The appellant was given its costs of the appeal. The order for costs in the court below both on the claim and the counterclaim were affirmed. The deposit paid into court was ordered to be

refunded to the appellant. We were advised that there was a sum paid into court by the defendant pursuant to an order of this court. That sum was ordered to be paid out forthwith to the first respondent.

Abdul Aziz Mohamad JCA:

[9] I have read the draft of my learned brother Gopal Sri Ram JCA's grounds of judgment. I associate myself with the contents of the draft except in the matter of the second order, which was about the 30% share in *Syarikat State Motor*. That order was one of the reliefs sought by the appellant in his counterclaim, as may be seen in para 19(6) of the statement of defence and counterclaim. The learned judge granted the appellant that relief, as may be seen in para 6 of the judgment. Since the second order had been sought by the appellant himself, naturally it was not included in his notice of appeal as a decision appealed against. My learned brother, however, in para 6 of his draft, appears to view the second order as a relief for the respondent company which, though not claimed by them specifically, was 'a necessary adjunct and hence a consequential order' to the first order, which was a RM870,000 judgment for the respondent company. And paras 6 and 7 set out considerations of principles of equity that my learned brother considers would support or justify the granting of the second order. As, however, the appellant did not appeal against the second order (although affirm it we did), and as moreover it was an order that the appellant himself sought in his counterclaim, the question of justifying or finding support for the second order did not arise and could not have arisen in the appeal, and therefore, in my respectful view, the discussion in paras 6 and 7 of my learned brother's draft is superfluous.

Orders varied.

Reported by Sally Kee